IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

In re:	)	
	)	
TONY R. SMITH and	)	Case No. 01-44618
DARLENE K. SMITH,	)	
	)	
Debtors.	)	

MEMORANDUM OPINION

Richard V. Fink, the Chapter 13 Trustee ("Trustee"), filed a motion asking the Court to reconsider its January 6, 2004 Memorandum Opinion and Order in this case, in which the Court ruled that Tony and Darlene Smith ("Debtors") were entitled to keep the proceeds of a lawsuit that was contingent and unliquidated at the time their Chapter 13 plan was confirmed by the Court. The Trustee asserts that the Court committed an error of law when it construed an asset as exempt to the fullest extent permitted by law when that asset was scheduled as having an "unknown" value and when the Debtors claimed "$0.00" of that asset as exempt pursuant to Mo. Rev. Stat. § 513.427. Furthermore, the Trustee argues that the Court erroneously ruled that the lawsuit solely belonged to the Debtors following confirmation when such a result was modified by the Court's Confirmation Order.

A motion to alter or amend a judgment, allowed within ten days after entry of the judgment under Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59(e), is only granted based on a showing of manifest error of law or fact or presentation of newly discovered evidence. *Nova Home Health Services, Inc. v. Casagrande (In re Casagrande)*, 143 B.R. 893, 900 (Bankr. W.D. Mo. 1992). Reviewing the Trustee's arguments, the Court is prepared to find that the Debtors sufficiently claimed their lawsuit as an exempt asset, and to rule that nothing in the Court's January 10, 2002 Order of Confirmation alters the Court's earlier judgment in this matter.

A. Effect of Scheduling an Exemption of a Contingent and Unliquidated Claim at "$0.00"

In the Trustee's Motion to Reconsider, the Trustee re-argues that the Debtors failed to claim their sexual harassment lawsuit as exempt when they listed the value of the sexual harassment lawsuit as "unknown" and claimed "$0.00" of that "unknown" amount as exempt pursuant to Mo. Rev. Stat.

§ 513.427.

The Trustee seeks to limit the Debtors' exemption pursuant to their own statements under the authority of *Stroebner v. Wick (In re Wick)*, 276 F.3d 412, 416 (8th Cir. 2002) (limiting the exemption of an asset of an "unknown" value to the extent permitted by law when the asset is also claimed as exempt in an "unknown" amount) and *Soost v. NAH, Inc. (In re Soost)*, 262 B.R. 68, 73-74 (B.A.P. 8th Cir. 2001) (holding that a debtor had failed to exempt the entire asset when the debtor valued the asset at $26,000.00 but claimed only $1.00 as exempt, and limiting the debtor to a $1.00 exemption). The Trustee further seeks to have any ambiguity construed against the Debtors as the drafters of the schedules. *See Addison v. Reavis*, 158 B.R. 53, 59 (E.D. Va. 1993) ("Because the debtors themselves have drafted these schedules and documents, the Court must construe any ambiguities therein against the debtors."), *aff'd sub. nom. Ainslie v. Grablowsky*, 32 F.3d 562 (4th Cir. 1994) (unpub.). The Trustee also contends that the Court erred in finding – on the basis of a statement made by the Trustee in an earlier motion – that the Trustee understood that the "$0.00" exemption amount claimed by the Debtors was in fact an effort to claim an exemption of an asset with an "unknown" value in an "unknown" amount.

In its earlier Memorandum Opinion the Court stated:

> While the Court notes that claiming $0.00 as exempt serves no useful purpose, and that time and ink could be conserved by simply omitting the lawsuit from the schedule of exempt assets, the fact remains that the Debtors' intent can be fairly ascertained simply because the Debtors listed the lawsuit on the schedule of exempt assets. Rather than stating a positive amount for the extent of the claimed exemption, the Debtors only stated that the basis for the exemption was Mo. Rev. Stat. § 513.427. Thus, the only fair inference based on the Debtors' Schedule C is that they claimed the lawsuit exempt to the extent allowed by the authorizing statute. The Trustee does not appear to have been misled by the Debtors' representations. In the Trustee's response to the Debtors' present Motion, the Trustee stated that he interpreted the "$0.00" listed on Schedule C as meaning "unknown," and based on the "unknown" amount listed as exempt for a contingent and unliquidated asset of an "unknown" value, the Trustee took the position that no amount was exempt. (Document No. 39, ¶ 4).

In re Smith, Case No. 01-44618, 2004 Bankr. LEXIS 11 (Bankr. W.D. Mo. January 6, 2004) (footnotes omitted).

The Trustee now asserts that the intent of his motion containing the above statement – and indeed, the consistent position of the Trustee throughout this case – was to limit the Debtors' exemption to "$0.00." The Trustee asserts that his office reviews thousands of Schedule Cs each year

and that he must be able to rely on the face of the document to ascertain the debtor's intent. To hold otherwise, the Trustee states, would require the Trustee to file thousands of objections and clog the Court's docket.

After considering the Trustee's arguments, the Court does not find any reason to alter its previous holding. The fact remains that the lawsuit was on the schedule of exempt assets, the authority for the Debtors' exemption was plainly stated, and rather than stating a positive amount for the exemption – which would make the case more analogous to *Soost*, *supra* – the Debtors did not limit their exemption by a positive dollar amount. Under the circumstances of this case, the Court determined that the Debtors' Schedule C could be fairly interpreted by a reasonable person to mean that the Debtors were exempting an asset of an "unknown" value in an "unknown" amount, which was precisely the case confronting the Eighth Circuit in *Stroebner*, 276 F.3d at 413, which interpreted the statement as exempting the entire asset to the extent allowed by law. This reasoning was only augmented by the fact that the Trustee plainly stated in a motion to this Court what the Court itself had concluded by viewing the Debtors' Schedule C.

The Court does not believe that its holding will result in an undue burden on the Trustee or clog the Court's docket.[1] The Court agrees that based on the face of Schedule C, the Trustee should be able to ascertain the intent of a debtor regarding what assets are claimed as exempt. Under the circumstances in this case, however, the Court believes that the face of the Debtors' Schedule C is sufficiently clear – even considering the ambiguity created by the Debtors – so as to require the Trustee to file an objection to the Debtors' claim of exemptions before confirmation of the Chapter 13 plan, if he believed that the exemption was improper or not authorized.

B. Post-Confirmation Liquidation of an Asset Constituting Property of the Estate

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[1] This is especially true considering the Trustee's preferred method for a debtor to claim exemptions. The Trustee's standard form for Schedule C provides:

> The debtor elects all exemptions to which the debtor is entitled under applicable state or otherwise applicable non-bankruptcy federal laws, state laws or local laws where the debtor's domicile has been located for the 180 days immediately preceding the filing of the petition or for the longer part of the 180 day period than any other place. The debtor does not claim any exemption in any amount greater than permitted by the applicable exemption law.

The Trustee agrees that a contingent and unliquidated lawsuit alleging personal injuries is wholly exempt under Missouri law. The Trustee argues, however, that the Court erred in finding that the Debtors' lawsuit vested back in the Debtors following confirmation pursuant to 11 U.S.C. § 1327(b).[2] More specifically, the Trustee directs the Court's attention to its Order Confirming the Debtors' Chapter 13 plan, which states:

> 5. Title to the property of the estate vests in the debtor(s) or as specified in the plan; however, the property of the estate which vests in the debtor(s) remains property of the estate pursuant to section 1306 for purposes of compliance with sections 1325(A)(4) [(Chapter 7 pay-out comparison)] and 1325(B) [(disposable income test)].

(Document No. 17).

This language presents at least two troubling concepts in the context of this case. First, may the Trustee use the value of an asset liquidated after the effective date of the plan to ensure that a Chapter 13 pay-out provides at least as much to creditors of the estate as they would receive in Chapter 7? Second, may the Trustee use the language in the Order confirming the Debtors' plan to circumvent the need to file an objection before confirmation under § 1325(b) to increase plan payments consistent with the Debtors' disposable income?

1. Remaining Property of the Estate for Compliance with 11 U.S.C. § 1325(a)(4)

The Court's Order of Confirmation provided that property of the estate vested in the Debtors, pursuant to 11 U.S.C. § 1327(b), but that the estate retained an interest in the estate property for purposes of compliance with § 1325(a)(4). That subsection states:

> (a) Except as provided in subsection (b), the court shall confirm a plan if--
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> ....
>
> (4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date ....

11 U.S.C. § 1325(a)(4).

In a Chapter 7 case, a debtor's right to claim exemptions is the day of filing. § 522(b)(2)(A); *Armstrong v. Peterson (In re Peterson)*, 897 F.2d 935, 936 (8th Cir. 1990). Here, there is no dispute

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[2] That subsection provides:

> Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all property of the estate in the debtor.

11 U.S.C. § 1327(b).

that – but for the Debtors' claim of an exemption – the contingent and unliquidated lawsuit would have been property of the estate under Chapter 7 and under 11 U.S.C. § 541 of the Bankruptcy Code. As noted, *supra*, however, the Debtors sufficiently claimed the lawsuit as an exempt asset. On the effective date of the Debtors' Chapter 13 plan, their lawsuit was still contingent and unliquidated.

Under Missouri jurisprudence, personal injury claims are not assignable to creditors. *In re Kininson*, 177 B.R. 632, 634 (Bankr. E.D. Mo. 1995) ("Under Missouri law, a tort claim 'in which the wrong is regarded as one to the person rather than the injury affecting the estate or property' is not assignable.") (quoting *Scarlett v. Barnes*, 121 B.R. 578 (Bankr. W.D. Mo. 1990)). Any attachment of a lawsuit asserting personal injuries must occur after the claim is liquidated because an unliquidated litigation claim that seeks a mixture of personal injury and property damage compensation is exempt in its entirety in its unliquidated state. *In re Williams*, 293 B.R. 769, 777 (Bankr. W.D. Mo. 2003) (stating that "more than a century of case law holds that either pending or potential causes of action arising out of a personal injury tort are exempt in their entirety," and inviting the Missouri General Assembly to codify the exemption laws for personal injury lawsuits). Because the Debtors would be able to exempt their discrimination lawsuit in its entirety in a hypothetical Chapter 7 case under *Williams* and its predecessors, nothing in the Court's Order of Confirmation regarding the lawsuit remaining property of the estate under 11 U.S.C. § 1306 dictates a result that is contrary to the Court's January 6, 2004 Order.

2. Failure to Object Pursuant to 11 U.S.C. § 1325(b) Before Confirmation

Pursuant to 11 U.S.C. § 1325(b), if a trustee objects to confirmation of a plan, then a court may only approve the plan if the plan provides that all of the debtors' "projected disposable income to be received in the three-year period ... will be applied to make payments under the plan." 11 U.S.C. § 1325(b)(1)(B). By its express terms, however, § 1325(b) requires a trustee to object to confirmation prior to the invocation of the disposable income test. *See Midkiff v. Stewart (In re Midkiff)*, 342 F.3d 1194, 1202 (10th Cir. 2003) (stating that the "disposable income" requirement in subsection (b)(1)(B) is conditional on the trustee or a holder of an allowed secured claim making an objection; and because no party objected to the plan confirmation the ensuing conditions were not relevant); *In re Grissom*, 137 B.R. 689, 691(Bankr. W.D. Tenn. 1992) ("The time to require the application of the disposable income test is established by § 1325(b) as being at the confirmation hearing, and its application is triggered in only one way, that is, by the filing of an objection to the plan's confirmation.").

The Trustee argues, however, that he is exempted from this requirement by the Court's Order of Confirmation. The flaw in this argument is that there is but one confirmation of a plan. *Forbes v. Forbes (In re Forbes)*, 215 B.R. 183, 188 (B.A.P. 8th Cir. 1997) (stating that there is only a single plan confirmation made during the entire course of the bankruptcy case, and that the plan is a unitary constant and a solitary construct that only changes its identity consistent with its evolution throughout the bankruptcy case). Thus, the "effective date of the plan" – even if later modified – as stated in § 1325(b)(1) is an unchanging date. *Id.* at 189-90. Because there is only one "effective date of the plan," and the express language of § 1325(b)(1) envisions that an objection must be asserted before that date, a failure to act timely will bar a later objection on the same grounds pursuant to the confirmed plan's *res judicata* effect. § 1327.

Here, the Debtors' Chapter 13 plan was confirmed by the Court on January 10, 2002, and the Trustee never filed an objection based on 11 U.S.C. § 1325(b). Thus, the statement in the Court's January 10, 2002 Order of Confirmation that "[t]itle to property of the estate ... remains property of the estate pursuant to 11 U.S.C. section 1306 for purposes of compliance with section[] 1325(B)" has no effect on the Court's January 6, 2004 Order approving the Debtors' exemption because § 1325(b) was never invoked by an objection of the Trustee prior to the plan's nascent. Nothing in the Court's Order of Confirmation alters the effect of the statutory provisions of the Bankruptcy Code. Accordingly, the Trustee cannot now assert 11 U.S.C. § 1325(b) as a basis for bringing the proceeds of the settlement into a plan that was confirmed without objection.

III. CONCLUSION

The Court will deny the Trustee's motion to reconsider the Court's January 6, 2004 Order approving the Debtors' exemption of an unliquidated sexual harassment lawsuit. Under the peculiar facts of this case, the Debtors sufficiently claimed an exemption in their unliquidated and contingent lawsuit by listing the value of the lawsuit on the schedule of exempt assets as "unknown," by claiming the amount of "$0.00" as exempt, and by providing the statutory basis for their exemption. On the face of the Debtors' schedule of exempt assets, a reasonable person would conclude that the Debtors, albeit inartfully, were attempting to exempt an asset of an unknown value in an unknown amount pursuant to the statutory authority, which is sufficient under Eighth Circuit jurisprudence to exempt that asset to the fullest extent of the law. In the event the Debtors' lawsuit is liquidated post-confirmation, their lawsuit does not become property of the estate pursuant to the Court's January 10, 2002 Order of

Confirmation because: 1) that Order expressly conditioned the re-vesting of estate property in the Debtors to allow the estate an interest for purposes of complying with 11 U.S.C. § 1325(a)(4), and because the value of the Debtors' estate, as of the effective date of the plan, was not less than what creditors would receive in a Chapter 7 distribution, § 1325(a)(4) was fully satisfied; and 2) that Order expressly conditioned the re-vesting of estate property in the Debtors to allow the estate an interest for purposes of complying with 11 U.S.C. § 1325(b), and because the Trustee did not timely object pursuant to § 1325(b) before confirmation, that section never became applicable to the Debtors' Chapter 13 case.

This opinion constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 9014. A separate order shall be entered pursuant to Fed. R. Bankr. P. 9021.

ENTERED this 20th day of February 2004.

/s/ Jerry W. Venters
HONORABLE JERRY W. VENTERS
UNITED STATES BANKRUPTCY JUDGE

A copy of the foregoing was served
electronically or conventionally to:

Richard V. Fink
Kenneth Eitel